Supreme Court, U.S.
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No._____

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1998

DONALD W. DUNLAP,

Petitioner,

vs.

NATIONAL BANK OF ALASKA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

M. Ashley Dickerson
Dickerson and Gibbons, Inc.
1330 East 15th Avenue
Anchorage, Alaska 99501
(907) 276-7454
ATTORNEYS FOR PETITIONER

53 pp

QUESTIONS PRESENTED

1. Can 11 U.S.C. 1328(a) be interpreted to allow the debtor to complete payments, under a chapter 13 plan, and not receive a discharge absent the statutory exceptions in light of the mandatory discharge language in 11 U.S.C. 1328(a); and

2. Does a debtor waive his right to discharge if he does not move to have a discharge entered before the Bankruptcy Court.

PARTIES TO THE PROCEEDING

According to National Bank of Alaska, it services the loan in this case on behalf of Alaska Housing Finance Corporation (AHFC), an instrumentality of the State of Alaska. AHFC is the real party in interest in this case, but to avoid confusion the practice of the courts below of referring to Appellees as National Bank of Alaska will be continued.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CITATIONS v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

THE PETITION SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE IN CONFLICT REGARDING THE INTERPRETATION OF THE MANDATORY LANGUAGE OF DISCHARGE AFTER COMPLETION OF A TAPE CHAPTER 13 PLAN 5

THE SUPERVISORY POWERS OF THIS COURT IS NECESSARY TO REVIEW THE DEPARTURE OF THE NINTH CIRCUIT'S INTERPRETATION FROM THE PLAIN LANGUAGE OF 11 U.S.C. 1328(a). 7

COURTS SHOULD LOOK TO THE PLAIN LANGUAGE OF 11 U.S.C. 1328(a) FOR ITS MANDATORY EFFECT 8

DUNLAP (DEBTOR) DID NOT WAIVE HIS

STATUTORY RIGHT TO DISCHARGE UNDER TITLE 11, U.S.C. 1328(a) OF THE BANKRUPTCY CODE BY FAILING TO MOVE FOR SUCH DISCHARGE 17

EFFECT OF NOBLEMAN 19

THE LOWER COURT ERRED IN FASHIONING EQUITABLE RELIEF WHEN THE MOVING PARTY HAS AN ADEQUATE RELIEF AT LAW 21

CONCLUSION 23

APPENDIX 24

TABLE OF CITATIONS

Cases

Ex parte Public Nat. Bank of New York, 278 U.S. 101, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928) 12

Braxton v. U.S., U.S.Md. 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed. 2d 385 8

In Re Bonder, 3 B.R. 623 (Bankr E. D.NY. 1980) 22

In re Margarita P. Vlavianos, 79 B.R. 789 (Bkrtcy. W.D. Va. 1986) 6

In re McKinney, 191 B.R. 866 (Bankr. D. Or. 1996) 11

In Re Meitzer, 11 B.R. 624 (Bankr. E. D. N.Y. 1981) 22

In Re Michael, 183 B.R. 230, at 237 (Bkrtcy.D.Mont. 1995) 14

In Re Spirtos, 992 F.2d 1004, 1007 (9th Cir. 1993) 22

In re Tackaberry, 13 B.R. 881(Bankr. D. Minn. 1981) . . . 13

In the matter of Foster, 670 F.2d 478 (C.A. 5 Tex. 1982) . 14

In The Matter of Stuart, 31 B.R. 18 (Bankr. D. Connecticut 1983) 22

Matter of Ponteri, 31 B.R. 859 (Bankr. D. New Jersey 1983) 22

Morales v. Trans World Airlines, Inc. 504 U.S. 374, 381, 112 S.CT. 2031,2035, 119 L. E.d.2d 157 (1992) 21

Mutschler v. Peoples National Bank of Washington, 607 F.2d 274, at 276 B.R. 861 (Bkrtcy.D.Md. 1994) 15

Nobleman v. American Sav. Bank (In re Nobleman), 508 U.S. 324 (1993) 3, 4, 9

Rake Et AL. v. Wade, Trustee, 508 U.S. 464 (1993) 12

Re Hougland, 886 F.2d 1182 (9th Cir. 1989) 1

Re Phelps, 149 B.R. 534, (Bankr. ND Ill. 1993) 15, 20

Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 12

United States v. Austin, 614 F.Supp. 1208 (D.C.N.M. 1985) 14

Washington Market Co. V. Hoffman, 101 U.S. 112, 115, 25 L.Ed782 (1879) 12

West vs. Costen, 826 F. 2d 1376 (4th Cir. 1987) 5

Statutes Cited

11 U.S.C. 1329(a) 15

11 U.S.C. 727 22

11 U.S.C. Section 1328(a) 2, 3, 5-7, 9, 10, 13, 15, 17, 19

Other Authorities

Collier on Bankruptcy ¶ 1328.02 (3rd Edition Revised 1996). 17, 18, 21

5 *U.S. Cong. & Adm. News* 6085 (1978) 16

Revision Notes and Legislative Reports 1978 Acts. ... 16, 20

Webster's New Twentieth Century Dictionary, Second Edition (1983) 11

OPINIONS BELOW

The December 24, 1997 decision of the United States court of Appeals for the Ninth Circuit can be found at App.1. The Denial of Petition for Rehearing can be found at App. 10. The Bankruptcy court order on remand can be found at App. 11.

STATEMENT OF JURISDICTION

The judgment of the three judge panel of the United States Court of Appeals for the Ninth Circuit was entered on December 24, 1998. The petition for rehearing was denied on March 31, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. 1328(a), 11 U.S.C. 1329(a), 11 U.S.C. 1327(a) and 11 U.S.C. 727 are set forth in their entirety in the Appendix.

STATEMENT OF THE CASE

The Statement of the case encompasses the Procedural History of the case:

In January, 1990, Donald Dunlap filed a Petition under Chapter 13 pursuant to the Ninth Circuit Court of Appeals ruling in *Re Hougland*, 886 F.2d 1182 (9th Cir. 1989) which held that:

(1) A Chapter 13 Debtor could bifurcate a claim secured only by the Debtor's principal residence into a secured and unsecured portion;

(2) The lenders' rights on the unsecured claim could be modified.

The Bankruptcy Court confirmed the Reorganization Plan on July 13, 1990. National Bank of Alaska (Creditor, NBA) appealed the confirmation of the Plan to the District Court. NBA did not seek a stay of the confirmed Plan pending appeal, in fact, NBA opposed Dunlap's application for a stay. The stay was denied and the Plan went forward. The District Court affirmed the Bankruptcy Court's confirmation of the Plan but remanded for additional Findings of Fact.

Meanwhile Dunlap made all payments required by the Plan and completed them in March, 1993 when the Bankruptcy Court proposed to enter a discharge. Under Title 11 U.S.C.

Section 1328(a) of the Bankruptcy Code, NBA objected to the discharge on the grounds that its appeal from the Order confirming the Plan remained pending. NBA did not cite case law, rules or statutes for such objection to Dunlap's 1328(a) discharge. No stay was had and Dunlap had completed payments under the chapter 13 plan.

In June, 1993, the Supreme Court decided *Nobleman v. American Sav. Bank (In re Nobleman)*, 508 U.S. 324 (1993), and held a strip-down provision, such as that included in Dunlap's (Debtor) Plan, to be invalid.

NBA moved, under Federal Rule of Civil Procedure 60(b)(6), for relief from the Confirmation Order based upon the change in law which *Nobleman* brought about. The Bankruptcy Court denied the Motion and issued another Notice of Intent to Enter Discharge. NBA again objected to Debtor 1328(a) discharge. Once again NBA cited no case laws, rules or statutes to support such objection to discharge.

In 1995, some two years after Debtor had fully completed his Chapter 13 Reorganization Plan, the District Court vacated the Bankruptcy Court's Order in light of *Nobleman* and remanded.

In 1995, the Bankruptcy Court modified the Order, confirming the Plan by reinstating NBA's secured claim in it's full amount, eliminating the strip-down provision, and awarding NBA's attorney's fees. The District Court affirmed and Dunlap appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals affirmed the District Court's modification of Dunlap's (Debtor) fully completed Chapter 13 Reorganization Plan, but vacated the lower Court award of attorney's fees.

Both NBA and Dunlap petitioned for rehearing. The panel granted NBA's Petition, withdrew its Memorandum and ordered the appeal to be heard by a Merit's Panel.

In February, 1998, a re-hearing was held via telephone

from Seattle, Washington. The Ninth Circuit Court of Appeals reaffirmed its previous Order and denied Dunlap's Petition for a Re-Hearing (en banc).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE IN CONFLICT REGARDING THE INTERPRETATION OF THE MANDATORY LANGUAGE OF DISCHARGE AFTER COMPLETION OF A TAPE CHAPTER 13 PLAN.

A conflict exists in the circuits, as to the requirement to issue a discharge after completion of a chapter 13 plan. In the instant case, the ninth circuit interpreted 11 U.S.C. 1328 (a) as not requiring a discharge of debtor and as allowing modification of a chapter 13 plan after completion of all payments under the plan.

The Fourth Circuit interprets 11 U.S.C. 1328 (a) differently than the ninth circuit. In *West vs. Costen*, 826 F. 2d 1376 (4th Cir. 1987), the debtor (*Costen*) completed payments

under a chapter 13 plan. The court stated, "Once Costen completed his payments the bankruptcy court had no choice but to grant him a discharge." See also *In re Margarita P. Vlavianos*, 79 B.R. 789 (Bkrtcy. W.D. Va. 1986) (Section 1328 (a), which governs discharges in chapter 13 cases, unequivocally states that "the court shall grant the debtor a discharge" after completion by the debtor of all payments under the plan. 11 U.S.C. 1328 (a). The language of this section is unambiguous and provides no exceptions. Thus, since the debtor has completed all payments under her plan, the court must grant the debtor her discharge.) The fourth circuit's interpretation of 11 U.S.C. 1328 (a) is consistent with the plain language of the statute.

The ninth circuit panel's ruling that a discharge is not required in a chapter 13 case after completion of payments is inconsistent with the plain language of the statute. It does not interpret 11 U.S.C. 1328 (a) as requiring a discharge if

payments under a chapter 13 plan have been completed despite the mandatory language. In the instant case, the ninth circuit also ruled that a completed chapter 13 plan is subject to modification.

THE SUPERVISORY POWERS OF THIS COURT IS NECESSARY TO REVIEW THE DEPARTURE OF THE NINTH CIRCUIT'S INTERPRETATION FROM THE PLAIN LANGUAGE OF 11 U.S.C. 1328(a).

The ninth circuit's interpretation of a 11 U.S.C. 1328 (a) is contrary to the plain language of the statute and the fourth circuit's interpretation. The ninth circuit is the largest circuit and its interpretation will have a far reaching effect. It is appropriate in this case that this court exercises its supervisory power as the ninth circuit has departed too far from the accepted and usual course of judicial proceedings with respect to its interpretation of 11 U.S.C. 1328 (a). The supervisory power of this court is necessary to ensure that the

ninth circuit gives effect to the plain language of 11 U.S.C. 1328 (a). This exercise of supervisory power is a primary purpose of certiorari. *Braxton v. U.S., U.S.Md.* 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed. 2d 385.

COURTS SHOULD LOOK TO THE PLAIN LANGUAGE OF 11 U.S.C. 1328(a) FOR ITS MANDATORY EFFECT.

I.

The ninth circuit decision overlooked the mandate of 11 U.S.C. 1328(a). That provision requires discharge after completion of the Debtor's Plans unless one of the exceptions set forth in the Statute is present.

Debtor, Donald W. Dunlap, filed a voluntary petition and plan under Chapter 13. The Bankruptcy Court confirmed the plan and Dunlap began making payments under the confirmed plan. Mr. Dunlap sought a stay of his plan; National Bank of Alaska opposed the stay and the Court did not enter a stay. The Trustee issued a Final Account of Chapter 13 Trustee and Declaration of Full Performance filed April 23, 1993. Thereafter,

the Bankruptcy Court modified the completed plan based upon the Supreme Court's Decision in *Nobleman v. American Sav.*, 508 U.S. 324 (1993). It should be noted that the *Nobleman* case was decided June 1, 1993, subsequent to Mr. Dunlap's completion of his plan and subsequent to the Trustee's issuance of the Final Account.

The Court overlooked the mandate of 11 U.S.C. 1328(a). That statute provides:

> (c) As soon as practicable after completion by the debtor of all payments of the plan, unless the Court approves a written Waiver of Discharge executed by the Debtor after the Order for Relief under this chapter, the Court shall grant the Debtor a discharge of all debts provided for by the plan or disallowed under Section 502 of this title, except any debt –
>
> (1) provided for under Section 1322(b)(5) of

this title;

(2) of the kind specified in paragraph (5), (8) or (9) of Section 523(a) of this title; or

(3) for restitution, or a criminal fine, included in a sentence on the Debtor's conviction of a crime. 11 U.S.C. § 1328.

At the time Mr. Dunlap had completed his plan and the Trustee had issued its Final Account and Declaration, 11 U.S.C. 1328(a) was in full force as the law governing the issue discharge upon completion of Chapter 13 plans. 11 U.S.C. 1328(a) requires that Mr. Dunlap be granted a discharge upon completion of his plan that National Bank of Alaska did not want stayed.

The Bankruptcy Court erred by failing to enter the discharge as was mandated under 11 U.S.C. 1328(a), absent the presence of one or more of the exceptions[1] set forth in the statute. The statute says that the Bankruptcy Court "shall grant

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[1]There has never been any claim by the National Bank of Alaska that a statutory exception existed.

the debtor a discharge of all debts provided for by the plan." Shall is defined as follows: to express futurity in the first person, and determination, compulsion, obligation, or necessity in the second and third persons. Webster's New Twentieth Century Dictionary, Second Edition (1983). The statute does not allow the option of not discharging the Debtor, if payments under the Chapter 13 Plan are complete. The language of the statute must be given its plain meaning. See *In re McKinney*, 191 B.R. 866 (Bankr. D. Or. 1996).

Mr. Dunlap's position is that Section 1328(a) mandates a discharge if payments are completed in a Chapter 13 Plan. The decision by the ninth circuit states that Section 1328(a) does not mandate a discharge when payments under the plan have been completed. The Court interpretation of the statute is that the language "as soon as practicable" changes the meaning of shall from compulsive to permissive. It is Mr. Dunlap's position that the language "as soon as practicable" refers to when the

discharge will be issued, not "if" the discharge will be issued.

One part of a statute should not be interpreted so as to modify another part of the same statute. The Supreme Court has said, "We generally avoid construing one provision in a statute so as to suspend or supersede another provision." *Ex parte Public Nat. Bank of New York*, 278 U.S. 101, 49 S.Ct. 43, 44, 73 L.Ed. 202 (1928) (quoting *Washington Market Co. V. Hoffman*, 101 U.S. 112, 115, 25 L.Ed782 (1879). The ninth circuit's interpretation of Section 1328(a) has allowed the provision "as soon as practicable" (when) to modify "shall" (compulsion). The former does not modify the latter. It merely defines when it must occur.

This Court has previously ruled on statutory interpretation of the bankruptcy code. "'Where the statutory language is clear, our "sole function... is to enforce it according to its terms.'" *Rake Et AL. v. Wade, Trustee*, 508 U.S. 464 (1993) (citing *United States v. Ron Pair Enterprises, Inc.*, 489

U.S. 235 (1989). The primary statute for review is 11 U.S.C. 1328(a). It states in unambiguous language that if chapter 13 plan payments are completed a discharge must be granted unless one of the statutory exceptions apply. National Bank of Alaska does not claim an exception.

The mandatory effect of 11 U.S.C. 1328(a) has been interpreted previously. The Bankruptcy Court in the District of Minnesota has addressed the issue. That Court held that the language of 11 U.S.C. 1328(a) is clear and unambiguous along with the reading of the legislative history. *In re Tackaberry*, 13 B.R. 881(Bankr. D. Minn. 1981). Also the Fifth Circuit has said,

> "In return for compliance with Chapter 13 Plan, Debtor is entitled to discharge of all debts provided for by Plan and disallowed claims, except any debt provided for under section allowing plan to cure any default within reasonable time and maintain payments while case is pending on any unsecured claim or secured claim on which less payment is due after date on which final payment under Plan is due or support to Debtor's former spouse or

child pursuant to divorce decree." *In the matter of Foster*, 670 F.2d 478 (C.A. 5 Tex. 1982).

In the present case the language is clear and unambiguous. Congress commanded the Bankruptcy Court to issue a discharge if the Debtor has completed payments under the Plan. Congress went on to set out the exceptions when a discharge could be modified after payments were completed. There is no other meaning to be attached to the statute. According to *In Re Michael*, 183 B.R. 230, at 237 (Bkrtcy.D.Mont. 1995), . . . [t]he courts must presume that a legislature says in a statute what it means and means in a statute what it says there. TheBankruptcy Court should only look to the language of the statute, should not construe any word as superfluous or void, and should apply the statute's literal meaning. *United States v. Austin*, 614 F.Supp. 1208 (D.C.N.M. 1985). As a result, the Debtor should be discharged as soon as payments are completed. When there is legislative history and where the meaning is unambiguous, the

Bankruptc Court may not deny the effect of a portion of the statute, but must give effect to all of its parts. *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274, at 276 B.R. 861 (Bkrtcy.D.Md. 1994). Therefore, the Court must discharge this debt according to 11 U.S.C. 1328(a).

Completion of payments under the Chapter 13 Plan is all that is required to prevent modification of Mr. Dunlap's Plan. "Completion of payments" as the phrase is used in 11 U.S.C. 1329(a), means completion of payments by Debtor to Trustee, and, therefore, Trustee is time-barred from amending Debtor's Plan after Debtor has made all payments required under Plan to Trustee; completion of payments by Trustee to creditors is not required for "completion of payments" as contemplated by § 1329(a). *Re Phelps*, 149 B.R. 534, (Bankr. ND Ill. 1993).

Legislative history supports Mr. Dunlap's position.

The Court is to enter a discharge, unless

> waived, as soon as practicable after completion of payments under the plan. The Debtor is to be discharged of all debts provided for by the plan or disallowed under Section 502, except provided for under the plan the last payment on which was not due until after the completion of the plan, or a debt incurred for willful and malicious conversion of or injury to the property or person of another. 11 U.S.C.A. § 1328, Discharge. *Revision Notes and Legislative Reports* 1978 Acts.

The *Revision Notes and Legislative Reports* following the statute are as clear and unambiguous as the statute itself. Its language is also mandatory in that the Court "is to enter a discharge". See also 5 *U.S. Cong. & Adm. News* 6085 (1978) (After the Debtor completes performance under the Plan, the Court grants the Debtor a discharge from all of the debts

provided for under the Plan).

Collier on Bankruptcy addresses the issue before the Court. Section 1328(a), derived from Section 660 of the former Bankruptcy Act, directs the Court to grant the Debtor a discharge as soon as practicable after completion of all payments under the Chapter 13 Plan, unless discharge has been duly waived. There is no requirement that the Debtor apply for a discharge. *Collier on Bankruptcy* ¶ 1328.02 (3rd Edition Revised 1996).

DUNLAP (DEBTOR) DID NOT WAIVE HIS STATUTORY RIGHT TO DISCHARGE UNDER TITLE 11, U.S.C. 1328(a) OF THE BANKRUPTCY CODE BY FAILING TO MOVE FOR SUCH DISCHARGE.

In its memorandum opinion dated December 24, 1997, on page (4) at paragraph (1), the Ninth Circuit Court of Appeals held that Dunlap waived his right to discharge under Title 11 U.S.C. 1328(a) of the Bankruptcy Code by failing to

move for a discharge upon completion of his Chapter 13 Reorganization Plan. (No supporting case law cited by the lower Court in its ruling.)

Collier on Bankruptcy addressed the issues of a Chapter 13 full compliance discharge under Section 1328(a) and also addressed the issue on the waiver of such discharge.

Section 1328(a), derived from Section 660 of the former Bankruptcy Act, directs the Court to grant the Debtor a discharge as soon as practicable after the completion of all payments under the Chapter 13 Plan unless discharge has been duly waived.

The Chapter 13 Trustee is best situated to determine when payments under the Plan have been completed and should initiate the process for granting of a discharge for full compliance, which, in turn, should prompt the scheduling of the discharge hearing, if one is to be held, under Section 524(d). *Collier on Bankruptcy* Section 1328.02 (3rd Edition

Revised 1996).

EFFECT OF NOBLEMAN

The Supreme Court's decision in *Nobleman* should have no effect on the application of 11 U.S.C. 1328(a) in this case. *Nobleman* was decided after Mr. Dunlap completed his Plan. That case did not change the meaning or effect of 11 U.S.C. 1328(a). Once Mr. Dunlap completed payments under his Plan, the Court was obligated by statute to issue a discharge based on the completed Plan. To do otherwise is to create an additional exception to those set forth in the statute by Congress.

Mr. Dunlap raised the issue of mandatory discharge in the lower court. The matter was brought to the lower court's attention in open court by arguing that Plan payments had been completed.

Mr. Dunlap's obligation to make payments under the

Plan was decided. The lower court confirmed the Plan that was fully executed by Mr. Dunlap. The confirmation of the Plan included specific amounts to be paid at specific interval. Mr. Dunlap's obligation under the completed Plan was fully decided by the Bankruptcy Court.

Although no case has been found with the same fact pattern as the instant matter, similar circumstances with respect to a completed plan is found in *Re Phelps*. It determined that once payments are completed under a Chapter 13 plan no subsequent modification of the plan is permissible except as set forth in the statute.

The applicable statute states that a discharge must be granted upon completion of plan payments subject to specified exceptions. Legislative history and notes to the statutes concur with the mandatory language of the statute[2]. Case law including authority from the Fifth Circuit states that a

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[2]11 U.S.C.A. Sec. 1328, Discharge. *Revision Notes and Legislative Reports* 1978 Acts

completed plan can not be modified and the debtor must be granted a discharge pursuant to the completed plan. Commentary[3] on the statute and its effect states that a completed plan is not subject to modification except as allowed by statute. There is no authority supporting any result other than that required by the statute.

THE LOWER COURT ERRED IN FASHIONING EQUITABLE RELIEF WHEN THE MOVING PARTY HAS AN ADEQUATE RELIEF AT LAW.

It is basic doctrine of equity jurisprudence that courts of equity SHOULD NOT ACT . . . when the moving party has an adequate remedy at law. *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 381, 112 S.CT. 2031,2035, 119 L. E.d.2d 157 (1992) (citation and internal quotation omitted).

The adequate remedy at law in this case is Title 11, U.S.C. Section 1328(a) which directs the Court to enter a discharge to a Chapter 13 debtor if all required payments under

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[3]*Collier On Bankruptcy*, Paragraph 1328.02 (3rd Edition Revised 1996)

the Reorganization Plan had been made.

Furthermore, the *In Re Spirtos*, 992 F.2d 1004, 1007 (9th Cir. 1993), that the lower court is relying on as its supporting authority is not applicable.

The *Spirtos* discharge case is a Chapter 7 discharge, governed by Section 727 and the provisions of that statute. However, the case before this Court is a Chapter 13 discharge, governed by the provisions of Section 1328(a) of the Bankruptcy Code. The provisions of Section 727 do not apply to Chapter 13 cases. Title 11 U.S.C. 103(b).[4]

A creditor in a chapter 13 case may not utilize 11 U.S.C. 727 in objecting to the discharge of a Chapter 13 debtor. *In Re Bonder*, 3 B.R. 623 (Bankr E. D.NY. 1980); *In Re Meitzer*, 11 B.R. 624 (Bankr. E. D. N.Y. 1981); *Matter of Ponteri*, 31 B.R. 859 (Bankr. D. New Jersey 1983); *In The Matter of Stuart*, 31 B.R. 18 (Bankr. D. Connecticut 1983).

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[4]11 U.S.C. Section 103(b) provides: subchapters I and II of Chapter 7 of this title only applies in case under such chapter.

CONCLUSION

Accordingly, Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Dated this 29th day of June, 1998.

Respectfully submitted,

M. Ashley Dickerson
DICKERSON &
GIBBONS, INC.
Attorneys for Petitioner
1330 East 15th Avenue
Anchorage, AK 99501
(907) 276-7454

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19___

DONALD W. DUNLAP,	)
	)
Petitioner,	)
	)
vs.	)
	)
NATIONAL BANK OF ALASKA,	)
	)
Respondent.	)
	)

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

M. Ashley Dickerson
Dickerson and Gibbons, Inc.
1330 East 15th Avenue
Anchorage, Alaska 99501
(907) 276-7454
ATTORNEYS FOR PETITIONER

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DONALD W. DUNLAP Debtor,	)
DONALD W. DUNLAP,	)No. 95-36079
Plaintiff-Appellant	)D.C. No. Cv-95-00135-JKS
v.	) MEMORANDUM*
NATIONAL BANK OF ALASKA,	) FILED Dec 24 1997)Cathy A. Catterson, Clerk)U.S. Court of Appeals
Defendant-Appellee	)

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted November 4, 1997
Seattle, Washington

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,** Senior District Judge

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

In January 1990, Donald W. Dunlap filed a petition under Chapter 13. The bankruptcy court confirmed the reorganization plan on July 13, 1990. The plan contained a so-called strip-down provision which limited National Bank of Alaska's (NBA) claim, secured by a mortgage on Dunlap's residence, to the fair market value of the property and made the remaining debt unsecured and hence dischargeable. NBA appealed the confirmation of the plan to the district court, contending that the strip-down provision was invalid. It did not seek a stay of the plan pending appeal, however, and, in fact, opposed Dunlap's application for a stay. The stay was denied and the plan went forward. The district court affirmed the bankruptcy court's confirmation of the plan but remanded for additional findings of fact.

Meanwhile Dunlap made the payments required by the plan and completed them in March 1993. When the bankruptcy court proposed to enter a discharge, NBA objected on the ground that its appeal from the order confirming the plan remained

pending. Dunlap did not move for an order of discharge.

In June 1993, the Supreme Court decided Nobelman v. American Sav Bank (In re Nobelman), 508 U.S. 324 (1993), holding a stripdown provision such as that included in the plan to be invalid. NBA moved under Federal Rule of Civil Procedure 60(b) (6) for relief from the confirmation order based upon the change in law which Nobelman brought about. The bankruptcy court denied the motion and issued another notice of intent to enter discharge. NBA objected to the discharge and appealed from the order denying the Rule 60(b) motion. The district court vacated the bankruptcy court's order in light of Nobelman and remanded. The bankruptcy court modified the order, confirming the plan by reinstating NBA's secured claim in its full amount, eliminating the strip-down provision[1] and awarding NBA attorney's fees. The district court affirmed and Dunlap appealed.[1]

This court has jurisdiction under 28 U.S.C. § 158(d). The district court's decision on appeal from a bankruptcy court is reviewed denovo, Friedkin V Stembera (In re Stembera) , 85 F.3d 1400, 1404 (9th Cir. 1996), as are the bankruptcy court's conclusions of law, Fobian, 951 F.2d at 1151.

I. The Bankruptcy Court properly Deferred Discharging NBA's Unsecured Claim Against Dunlap pending NBA's Appeal.

1 The appeal initially came before a screening panel of this court which issued a memorandum decision affirming the district court's order confirming the plan as amended but vacating the award of attorney's fees under Fobian V. Western Farm Credit Bank, 951 F.2d 1149, 1153 (9th Cir. 1991). Both NBA and Dunlap petitioned for rehearing. The panel granted NBA's petition, withdrew its memorandum, and ordered the appeal to be heard by a merits panel.

Dunlap contends that the bankruptcy court was required to grant him a discharge of NBA's claim when he had completed the payments under the plan. He effectively waived the point by failing to move for a discharge at the time, raising it for the first time on appeal. In any event, his reliance on 11 U.S.C. §1328(a) is misplaced. It provides that "[a)s soon as practicable after completion by the debtor of all payments under the plan ... the court shall grant the debtor a discharge" 11 U.S.C. §1328(a) (West 1993). Section 1328(a) does not mandate, as Dunlap would have us find, that a discharge be granted when payments under the plan have been completed. It requires the bankruptcy court to grant the debtor a discharge only "as soon as practicable" after the completion of payments. Id. Because the full extent of Dunlap's obligation to make payments under the plan remained undecided during the pendency of NBA's appeal, it was not practicable to discharge its claim until the appeal had been decided.

Dunlap also contends that because NBA failed to obtain a stay of the plan, he was entitled to a discharge of NBA's unsecured claim upon completion of the plan (i.e., completion of the payments he was to make under the plan). The decision in Nobelman, he argues, can have no effect because it was not rendered until after confirmation and completion of the plan. Because NBA failed to obtain a stay of the confirmation and the plan, completion of Dunlap's payments rendered NBA's appeal moot and the bankruptcy court on remand could no longer modify the terms of the plan.

We reject this argument. So long as a reviewing court can "fashion relief that is both effective and equitable," an appeal does not become moot notwithstanding the absence of a stay of the bankruptcy court's decision. Spirtos V. Moreno (In re Spirtos). 992 F.2d 1004, 1007 (9th Cir. 1993). The cases Dunlap cites are distinguishable because in those cases events occurred in the interim that made it impossible for the appellate

court to provide equitable and effective relief. See Spirtos, 992 F.2d at 1007; see. e.g., In re Valley Nat'l Bank of Arizona v. Trustee, 609 F.2d 1274 (9th Cir. 1979); In re Matter of Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977). That is not true here. The bankruptcy court could give effective and equitable relief: it could modify the plan to restore NBA's full secured claim, and no events occurred in the interim that would lead to an unfair or unjust result. Cf. In re Roberts Farms 652 F.2d 793, 796-98 (9th Cir. 1981) (noting that equitable principles may require that an appeal be held moot when appellee neglected to obtain stay pending appeal and rights of third parties were involved, e.g., sale of assets).

II. The Bankruptcy Court Erred in Awarding Attorney's Fees to NBA

Dunlap's contention that the bankruptcy court erred in

awarding attorney's fees to NBA has merit. Under Fobian, "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party." 951 F.2d at 1153. The issues litigated here, i.e., the effect of NBA's failure to obtain a stay of the plan pending appeal upon a debtor's right to discharge and the validity of the strip-down provision under 11 U.S.C. § 1322(b) (2), are issues "peculiar to federal bankruptcy law" and therefore do not permit an award of attorney's fees. See id.

NBA contends that Dunlap's application of Fobian's "judicial rule must give way to specific statutory enactments," namely, 11 U.S.C. § 1322(b) (2), which provides that a Chapter 13 "plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. §

1322(b) (2).

As a secured claim holder in Dunlap's principal residence, NBA argues that its right to attorney's fees is a right provided for in the deed of trust that is protected against modification by this statutory provision.

NBA misconstrues the effect of § 1322 (b) (2). The issue here is not whether Dunlap's plan modifies NBA's right to attorney's fees under its deed of trust Rather the issue is whether that right extends to recovery of fees incurred in litigating issues other than those arising under the deed of trust from which that right derives. NBA argues that the issues litigated were essentially contract enforcement issues and not issues peculiar to bankruptcy: its litigation, it says, was "no more than an attempt to enforce its contract, which the debtor had . announced his intention to breach by paying less than he was contractually obligated to pay." The argument is unconvincing. While the deed of trust entitled it to attorney's

fees and costs in bankruptcy proceedings, the issues litigated here, as noted above, are "solely issues of federal bankruptcy law." Fobian, 951 F.2d at 1153 (holding that bank could not recover fees and costs incurred in litigating objections to confirmation of plan based on failure to comply with bankruptcy code provisions protecting unsecured portions of its claim). Accordingly NBA was not entitled to attorney's fees and costs.

The judgment is AFFIRMED in part and VACATED in part.

NOTFOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DONALD W. DUNLAP Debtor,	)	
DONALD W. DUNLAP, Plaintiff-Appellant	))	No. 95-36079 D.C. No. Cv-95-00135-JKS
v.	)	ORDER
NATIONAL BANK OF ALASKA,	)	FILED MAR 31 1998
Defendant-Appellee	)	Cathy A. Catterson, Clerk U.S. Court of Appeals

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* Senior District judge

The panel as constituted above has voted to grant appellant's motion to accept supplemental petition for rehearing en banc and orders that said supplemental petition be filed. judges Fletcher and O'Scannlain vote to reject the petition for rehearing en banc, and judge Schwarzer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc Fed. R. App. P.35.

The petition for rehearing en banc is denied.

Honorable William W Schwarzer, Senior United States District Judge for the Northern District *of* California, sitting by designation.

HERBERT A. ROSS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA
605 West 4th Avenue, Room 138, Anchorage, AK 99501-2296 (Phone 907/271-2655)

In re DONALD W. DUNLAP,

Debtor(s)

Case No. A90-00025-HAR

Chapter 13

ORDER ON REMAND REGARDING DISCHARGE AND EFFECT OF NOBELMAN

A status conference was held on January 19, 1995, with respect to an order of remand issued by The Honorable James K. singleton of the U.S. District Court in light of Nobelman V American Savings (In re Nobelman), 113 SCt 2106 (1993). After hearing argument,

IT IS ORDERED that,

1. The order confirming the chapter 13 plan entered on July 13 1990 (Docket Entry 24), which stripped down the National

Bank of Alaska secured claim to $21,390 is modified as required by Nobelman to provide that the secured claim of National Bank of Alaska is the amount of its unpaid principal, interest, costs; and attorney fees, as they had accrued without regard to the strip down in the confirmation order, less any payments which have been made from time to time (either on the stripped down claim or on any unsecured claim) . This will require a re-amortization of the note.

2. Debtor has requested that his discharge be delayed until after March 31, 1995 since he may choose to voluntarily dismiss this case. After that date, the debtor's full compliance discharge under 11 U.S.C. § 1328(a) shall be entered, provided the Administrative Analyst of the Bankruptcy Court sees no other reasons for holding up discharge after having given notice of the intent to enter a discharge to interested parties, if notice has not already been given. The discharge shall be subject to the terms of this order.

3. If the debtor has not dismissed the case voluntarily by

March 31, 1995, the court shall keep the case open until May 1, 1995 to allow the parties access to the court to resolve any disputes regarding the accounting for the secured claim described in paragraph 1 of this order.

DATED: January 19, 1995
HERBERT A. ROSS
U.S. Bankruptcy Judge
Serve:
Paul Paslay, Esq. for Debtor
Richard Ullstrom, Esq. for National Bank of Alaska
Larry Compton, Trustee
U.S. Trustee
Clerk of Court

ORDER ON REMAND REGARDING
DISCHARGE AND EFFECT OF *NOBELMAN*

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless--
(1) the debtor is not an individual;
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
(A) property of the debtor, within one year before the date of the filing of the petition; or
(B) property of the estate, after the date of the filing of the petition;
(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
(4) the debtor knowingly and fraudulently, in or in connection with the case--
(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's

liabilities;
(6) the debtor has refused, in the case--
(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;
(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;
(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;
(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;
(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--
(A) 100 percent of the allowed unsecured claims in such case; or
(B)(i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or
(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.
(b) Except as provided in section 523 of this title, a discharge

under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.
(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.
(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.
(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--
(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or
(3) the debtor committed an act specified in subsection (a)(6) of this section.
(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--
(1) under subsection (d)(1) of this section within one year after such discharge is granted; or
(2) under subsection (d)(2) or (d)(3) of this section before the later of--

(A) one year after the granting of such discharge; and
(B) the date the case is closed.

§ 1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

§ 1328. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
(1) provided for under section 1322(b)(5) of this title;
(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or
(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.
(b) At any time after the confirmation of the plan and after

notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if--

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
(2) extend or reduce the time for such payments; or
(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.
(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

(2)

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OCT 22 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-475

In The

Supreme Court of the United States

October Term, 1998

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

ROBERT H. SILK
Counsel for Respondent
401 Broadway
New York, NY 10013-3005
(212) 941-5964

149266

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

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BRIEF FOR RESPONDENT IN PARTIAL OPPOSITION TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Amicus Curiae United States' proposed Supplemental Brief appears to agree with respondent, and petitioner does not deny, that Montreal Protocol No. 4 would lack retroactive effect here when it goes into force 90 days after the President signs the instrument of ratification and it is deposited with the Government of Poland.

Agreeing this case had *not* arisen under the Convention as amended by Montreal Protocol but earlier, *Amicus* US posits that *if* it had,

> the amended language would leave no doubt that the Convention bars [would bar!] respondent's state-law claim for damages which . . . does not satisfy Article 17's conditions for liability.

(p.3 US Supp. Brf.) But this was not the case. The parties' rights and obligations accrued long before the amendment.

Seeking to keep the petition alive in this Court though it has lost its significance on the docket because the law governing it is about to become obsolete, *Amicus* US argues that the Court should still decide the case on the merits because there may be some other cases in which the exclusivity provision of the original Warsaw Convention is applicable. It does not quantify how many or identify such cases. It nonetheless suggests that

> a decision by the Court on the merits would have some precedential significance [and b]ecause the case has now been fully briefed, we believe it would be appropriate for the Court to give the case plenary

> consideration despite ratification of the Protocol. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of such ratification if it occurs while this case is still pending.

(p.7 US Supp. Brf.)

A better alternative would be dismissal of the writ because of the recent events. *Amicus* US has already agreed that ratification now would not affect rights accrued at a time when the unamended Convention's Article 24 limited exclusivity to those cases "covered by Article 17" (Article 24(2)). Vacatur of the judgment below and "further consideration" by the court of appeals of this case "in the light of such ratification" of the inapplicable Montreal Protocol No. 4 would be a waste of judicial resources. So too would be argument and deliberation on this case in this Court. The issues raised here are about to become academic.

This case should not be decided upon any basis other than the law as it was when the cause accrued but which will soon expire. Imaginative hypothetical events which theoretically might or might not come to pass in the future are posed by *Amicus* US to justify burdening the Court with a case likely to be the last of its kind. The Court is asked by *Amicus* US to employ its resources, not for the sake of the parties here but to set precedent for cases arising under the law of foreign states which have not ratified Montreal Protocol No. 4, an illusory task, the Court lacking sway over foreign law, and a hypothetical trickle of domestic cases which may never be brought and in any event will soon dry up. This is asked because of a recent change in the law which does not govern the controversy at hand.

Respectfully submitted,

ROBERT H. SILK
Counsel for Respondent
401 Broadway
New York, NY 10013-3005
(212) 941-5964